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In the Matter of)	
)	
Revision of the Commission's Rules to Ensure)	CC Docket No. 94-102
Compatibility with Enhanced 911 Emergency)	
Calling Systems)	
)	
Petition for Enhanced 911 Phase II Waiver by)	
Leaco Rural Telephone Cooperative, Inc.)	

ORDER

Adopted: December 12, 2005

Released: December 12, 2005

By the Commission:

I. INTRODUCTION

1. In this *Order*, we address a petition for relief from the Commission's wireless Enhanced 911 (E911) Phase II requirements filed by Leaco Rural Telephone Cooperative, Inc. (Leaco), a Tier III wireless service provider¹ in rural New Mexico.² Specifically, Leaco seeks an extension of time to comply with the requirements contained in Section 20.18(g)(1) of the Commission's Rules that carriers employing a handset-based E911 Phase II location technology meet certain location-capable handset activation benchmarks and achieve ninety-five percent penetration, among their subscribers, of location-capable handsets by December 31, 2005.³

2. Timely compliance with the Commission's wireless E911 rules ensures that the important public safety needs of wireless callers requiring emergency assistance are met as quickly as possible. In analyzing requests for extensions of the Phase II deadlines, the Commission has afforded relief only when the requesting carrier has met the Commission's standard for waiver of the Commission's Rules.⁴ Where carriers have met the standard, the relief granted has required compliance with the Commission's rules and policies within the shortest practicable time.⁵ We are also mindful of Congress' directive in the

¹ Tier III carriers are non-nationwide Commercial Mobile Radio Service (CMRS) providers with no more than 500,000 subscribers as of the end of 2001. See Revision of the Commission's Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems; Phase II Compliance Deadlines for Non-Nationwide Carriers, CC Docket No. 94-102, *Order to Stay*, 17 FCC Rcd 14841, 14848 ¶ 22 (2002) (*Non-Nationwide Carriers Order*).

² See Leaco Rural Telephone Cooperative, Inc. Petition for Temporary Waiver of Section 20.18(g) of the Commission's Rules, CC Docket No. 94-102, filed Sept. 1, 2005 at 1 (Leaco Petition). Leaco subsequently submitted a Supplement to Petition for Temporary Waiver of Section 20.18(g) of the Commission's Rules, filed Oct. 18, 2005 (Leaco Supplement).

³ See 47 C.F.R. § 20.18(g)(1).

⁴ See Revision of the Commission's Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems; E911 Phase II Compliance Deadlines for Tier III Carriers, CC Docket No. 94-102, *Order*, 20 FCC Rcd 7709, 7709-7710 ¶ 1 (2005) (*Tier III Carriers Order*).

⁵ *See id.*

ENHANCE 911 Act to grant waivers for Tier III carriers of the ninety-five percent penetration benchmark if “strict enforcement . . . would result in consumers having decreased access to emergency services.”⁶

3. We conclude that, to the extent Leaco seeks relief from the location-capable handset sale and activation deadlines previously established in the *Tier III Carriers Order*,⁷ we cannot grant its request at this time. Based on the record before us, Leaco has not adequately justified the reasons for its (1) delay in notifying the Commission of its status and filing a renewed request for relief, and (2) failure to meet the terms and conditions of the *Tier III Carriers Order*. As a Tier III carrier that may face unique circumstances, and in light of the totality of the circumstances, we will afford Leaco additional time to augment the record to justify the untimeliness of its renewed request. Without further action on Leaco’s request for waiver of the location-capable handset sale and activation requirements, the deadline for compliance with all of the handset sale and activation requirements contained in Section 20.18(g)(i)-(iv) will be six months from release of this *Order*. Further, pursuant to the ENHANCE 911 Act, and based on the record before us, we find that some relief from the ninety-five percent handset penetration requirement, until one year following release of this *Order*, is warranted subject to certain conditions described below. These conditions are particularly important because Leaco has failed to demonstrate a “clear path to full compliance” with the Commission’s ninety-five percent handset penetration requirement consistent with the Commission’s E911 waiver standards.⁸

II. BACKGROUND

A. Phase II Requirements

4. The Commission’s E911 Phase II rules require wireless licensees to provide Public Safety Answering Points (PSAPs) with Automatic Location Identification (ALI) information for 911 calls.⁹ Licensees can provide ALI information by deploying location information technology in their networks (a network-based solution),¹⁰ or Global Positioning System (GPS) or other location technology in subscribers’ handsets (a handset-based solution).¹¹ The Commission’s rules also establish phased-in schedules for carriers to deploy any necessary network components and begin providing Phase II service.¹² However, before a wireless licensee’s obligation to provide E911 service is triggered, a PSAP

⁶ National Telecommunications and Information Administration Organization Act – Amendment, Pub. L. No. 108-494, 118 Stat. 3986 (2004). *See also infra* ¶ 8.

⁷ *See Tier III Carriers Order*, 20 FCC Rcd at 7729-30 ¶¶ 48-51.

⁸ Because we find that some relief from the ninety-five percent handset penetration requirement is warranted pursuant to the ENHANCE 911 Act, we need not determine whether Leaco has met the Commission’s waiver standard relative to the handset penetration requirement. Although demonstration of a “clear path to full compliance” is not required to warrant some relief under the ENHANCE 911 Act, this element of our waiver standard provides useful guidance in determining the extent to which such relief should be granted.

⁹ *See* 47 C.F.R. § 20.18(e).

¹⁰ Network-based location solutions employ equipment and/or software added to wireless carrier networks to calculate and report the location of handsets dialing 911. These solutions do not require changes or special hardware or software in wireless handsets. *See* 47 C.F.R. § 20.3(c), *Network-based Location Technology*.

¹¹ Handset-based location solutions employ special location-determining hardware and/or software in wireless handsets, often in addition to network upgrades, to identify and report the location of handsets calling 911. *See* 47 C.F.R. § 20.3(c), *Location-Capable Handsets*.

¹² *See* 47 C.F.R. §§ 20.18(f), (g)(2).

must make a valid request for service, *i.e.*, the PSAP must be capable of receiving and utilizing the data elements associated with the service and must have a mechanism in place for recovering its costs.¹³

5. In addition to deploying the network facilities necessary to deliver location information, wireless licensees that elect to employ a handset-based solution must meet the handset deployment benchmarks set forth in Section 20.18(g)(1) of the Commission's Rules, independent of any PSAP request for Phase II service.¹⁴ After meeting these benchmarks, licensees must achieve ninety-five percent penetration among their subscribers of location-capable handsets no later than December 31, 2005.¹⁵

B. Waiver Standards

6. The Commission has recognized that smaller carriers may face "extraordinary circumstances" in meeting one or more of the deadlines for Phase II deployment.¹⁶ The Commission previously has stated its expectations for requests for waiver of the E911 Phase II requirements. Waiver requests must be "specific, focused and limited in scope, and with a clear path to full compliance. . . . and should document their efforts aimed at compliance in support of any waiver requests."¹⁷ To the extent that a carrier bases its request for relief on delays that were beyond its control, it must submit specific evidence substantiating the claim, such as documentation of the carrier's good faith efforts to meet with outside sources whose equipment or services were necessary to meet the Commission's benchmarks.¹⁸ When carriers rely on a claim of financial hardship as grounds for a waiver, they must provide sufficient and specific factual information.¹⁹ A carrier's justification for a waiver on extraordinary financial hardship grounds may be strengthened by documentation demonstrating that it has used its best efforts to obtain financing for the required upgrades from available Federal, state, or local funding sources.²⁰ The Commission also noted, in considering earlier requests for relief by Tier III carriers, that it

¹³ See 47 C.F.R. § 20.18(j)(1).

¹⁴ See 47 C.F.R. § 20.18(g)(1)(i)-(iv).

¹⁵ See 47 C.F.R. § 20.18(g)(1)(v).

¹⁶ See *Tier III Carriers Order*, 20 FCC Rcd at 7714 ¶ 9; *Non-Nationwide Carriers Order*, 17 FCC Rcd at 14846 ¶ 20 ("wireless carriers with relatively small customer bases are at a disadvantage as compared with the large nationwide carriers in acquiring location technologies, network components, and handsets needed to comply with our regulations"); Revision of the Commission's Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems; E911 Compliance Deadlines for Non-Nationwide Tier III CMRS Carriers, CC Docket No. 94-102, *Order to Stay*, 18 FCC Rcd 20987, 20994 ¶ 17 (2003) (*Order to Stay*) ("under certain conditions, small carriers may face extraordinary circumstances in meeting one or more of the deadlines for Phase II deployment and [] relief may therefore be warranted").

¹⁷ Revision of the Commission's Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems, CC Docket No. 94-102, *Fourth Memorandum Opinion and Order*, 15 FCC Rcd 17442, 17458 ¶ 44 (2000) (*Fourth MO&O*). See also 47 C.F.R. § 1.3; 47 C.F.R. § 1.925(b)(3); *WAIT Radio v. FCC*, 418 F.2d 1153 (D.C. Cir. 1969), *appeal after remand*, 459 F.2d 1203 (D.C. Cir. 1972), *cert. denied*, 409 U.S. 1027 (1972); *Northeast Cellular Tel. Co. v. FCC*, 897 F.2d 1164 (D.C. Cir. 1990).

¹⁸ See *Order to Stay*, 18 FCC Rcd at 20996-97 ¶ 25.

¹⁹ See *id.* at 20997 ¶ 29. We note that the Commission generally is disinclined to find that financial hardship alone is a sufficient reason for an extension of the E911 implementation deadlines. *Id.*

²⁰ See *id.*

expects all carriers seeking relief to work with the state and local E911 coordinators and with all affected PSAPs in their service area, so that community expectations are consistent with a carrier's projected compliance deadlines. To the extent that a carrier can provide supporting evidence from the PSAPs or state or local E911 coordinators with whom the carrier is assiduously working to provide E911 services, this would provide evidence of its good faith in requesting relief.²¹

7. In applying the above criteria, the Commission has in the past recognized that special circumstances particular to smaller carriers may warrant relief from the E911 requirements. For example, the Commission has noted that some Tier III carriers face unique hurdles such as significant financial constraints, small and/or widely dispersed customer bases, and large service areas that are isolated, rural or characterized by difficult terrain (such as dense forest or mountains), along with a corresponding reduced customer willingness to forgo existing handsets that may provide expanded range, but are not location-capable.²² In evaluating requests for waiver from Tier III carriers, the Commission, therefore, has considered challenges unique to smaller carriers facing these circumstances.

8. Finally, distinct from the Commission's rules and established precedent regarding waivers of the E911 requirements, in December 2004 Congress enacted the Ensuring Needed Help Arrives Near Callers Employing 911 Act of 2004 (ENHANCE 911 Act).²³ The ENHANCE 911 Act, *inter alia*, directs the Commission to act on any petition filed by a qualified Tier III carrier requesting a waiver of Section 20.18(g)(1)(v) within 100 days of receipt, and grant such request for waiver if "strict enforcement of the requirements of that section would result in consumers having decreased access to emergency services."²⁴

C. Petition for Waiver

9. Leaco is a Tier III carrier currently operating an analog and TDMA network in rural areas of New Mexico and serving approximately 5700 subscribers.²⁵ Prior to filing the instant request for waiver, Leaco filed a request for waiver in August 2004 seeking relief from the handset benchmark deadlines and was granted its requested relief in the *Tier III Carriers Order* released April 1, 2005.²⁶ In its August 2004 request for waiver, Leaco noted that it had selected a CDMA air interface to implement a handset-based Phase II solution, and sought extensions of the location-capable handset penetration deadlines.²⁷ Specifically, Leaco sought the following extensions: (1) to begin selling and activating location-capable handsets by March 1, 2005, (2) to ensure that twenty-five percent of all new handset activations were location-capable by March 1, 2005, (3) to ensure that fifty percent of all new handset

²¹ *Id.* at 20997 ¶ 28.

²² See *Tier III Carriers Order*, 20 FCC Rcd at 7718, 7719, 7726, 7732, 7736-7737 ¶¶ 17, 19, 37, 57, 70.

²³ National Telecommunications and Information Administration Organization Act – Amendment, Pub. L. No. 108-494, 118 Stat. 3986 (2004).

²⁴ *Id.* at § 107(a), 118 Stat. 3986, 3991. The ENHANCE 911 Act defines a "qualified Tier III carrier" as "a provider of commercial mobile service (as defined in section 332(d) of the Communications Act of 1934 (47 U.S.C. 332(d))) that had 500,000 or fewer subscribers as of December 31, 2001." *Id.* at § 107(b), 118 Stat. 3986, 3991.

²⁵ See Leaco Petition at 1-2 (stating that Leaco provides service to New Mexico markets CMA 558-B3, Lincoln, New Mexico RSA 6-B3; BTA068-C Carlsbad, New Mexico; BTA191-C2 Hobbs, New Mexico).

²⁶ See *Tier III Carriers Order*, 20 FCC Rcd at 7729-30 ¶¶ 48-51.

²⁷ See *id.* at 7729 ¶ 48.

activations were location-capable by June 1, 2005, and (4) to ensure that 100 percent of all new digital handset activations were location-capable by September 1, 2005. The Commission found that Leaco had made substantial progress in laying out a clear path to compliance, and granted the extensions sought by Leaco.²⁸ However, the Commission stated that “Leaco will continue to be subject to the December 31, 2005 deadline for achieving ninety-five percent handset penetration rate among its subscribers.”²⁹

10. In the Leaco Petition, Leaco informs the Commission for the first time that, while it had projected in August 2004 completing its CDMA overlay by March 2005, it has not in fact begun its CDMA overlay, and thus failed to comply with the handset deployment deadlines of March 1, 2005 and June 1, 2005 imposed by the *Tier III Carriers Order*.³⁰ Leaco further states that it will be unable to meet the September 1, 2005 deadline to ensure that 100 percent of all new digital handset activations are location-capable or the December 31, 2005 ninety-five percent handset penetration deadline.³¹ Leaco contends that “unique circumstances, including delays beyond [its] control,” have left it with “no alternative but to request a temporary waiver and further extension.”³² First, it claims that a dispute with its CDMA vendors led to “protracted litigation” that has delayed construction of the CDMA overlay.³³ Second, Leaco submits that its former general manager, who left Leaco in December 2004, allowed the dispute with its vendors to “stall implementation even as FCC deadlines approached.”³⁴ Leaco asserts that, because of the alleged failings of its general manager, since August 2004, its Board of Directors (Leaco Board) “had no indication that little was being accomplished with regards to the necessary network upgrade and Phase II implementation schedule” and “was unaware that Leaco was likely to miss pending Phase II deadlines.”³⁵ Leaco states that it was not until shortly after the release of the *Tier III Carriers Order*, April 1, 2005, that the Leaco Board realized it “had missed significant Phase II implementation deadlines.”³⁶

11. Leaco reports that its new general manager, hired on April 27, 2005,³⁷ has established a “new, aggressive” “Network Upgrade Timetable” to implement Leaco’s CDMA overlay and to commence selling location-capable handsets.³⁸ Based on this plan, Leaco requests the following new extensions relative to those originally granted in the *Tier III Carriers Order*: (1) from March 1, 2005 to April 1, 2006 to begin selling and activating location-capable handsets; (2) from March 1, 2005 to April 1, 2006 to ensure that twenty-five percent of all new handset activations are location-capable; (3) from

²⁸ See *id.* at 7730 ¶¶ 50, 51.

²⁹ *Id.* at 7730 ¶ 51. The Commission added that its decision would not preclude Leaco from seeking additional relief of the handset penetration deadline under the standard articulated in the ENHANCE 911 Act. See *id.* at n.139.

³⁰ See Leaco Petition at 4. Leaco subsequently reported that its vendor intended to begin installation of new CDMA equipment by the first week of November 2005, and thus ahead of its new proposed date of December 1, 2005 for commencing its network upgrade to CDMA. See Leaco Supplement at 2.

³¹ See Leaco Petition at 4.

³² *Id.* at 2.

³³ See *id.* at 3.

³⁴ See *id.* at 5.

³⁵ See *id.* at 5-6.

³⁶ See *id.* at 6.

³⁷ See *id.* at 6 n.14.

³⁸ See *id.* at 6-7.

June 1, 2005 to April 1, 2006 to ensure that fifty percent of all new handset activations are location-capable; (4) from September 1, 2005 to July 1, 2006 to ensure that 100 percent of all new digital handset activations are location-capable, and (5) from December 31, 2005 to August 1, 2007 to ensure that it achieve ninety-five percent penetration of location-capable handsets among its subscribers.³⁹ Leaco asserts that the requested additional extensions are warranted under the Commission's waiver standards, as well as under the ENHANCE 911 Act.

III. DISCUSSION

A. Handset Sale and Activation Deadlines

12. For the reasons discussed below, we find that we cannot grant at this time Leaco's request for waiver of the handset sale and activation deadlines established in the *Tier III Carriers Order*. Leaco has not adequately justified the untimeliness of its renewed request. Further, Leaco has not explained its failure to meet the terms and conditions of the *Tier III Carriers Order*.

13. Leaco does not appear to have sufficiently explained the reasons for its delay in submitting its renewed request for waiver of the handset sale and activation deadlines previously established in the *Tier III Carriers Order* and its failure to meet those deadlines. Specifically, since March 1, 2005, the deadline set in the *Tier III Carriers Order* for commencing the sale and activation of location-capable handsets, Leaco should have been aware that it had been, and continues to be, in violation of its E911 obligations. Once its former General Manager departed in December 2004, Leaco should have made other arrangements to ensure regulatory compliance.⁴⁰ Further, the fact that Leaco had initiated litigation against its CDMA vendors in March of 2005⁴¹ suggests that the Leaco Board was aware that a major CDMA upgrade to its network, which was essential to Leaco's ability to meet the handset sale and activation deadlines ultimately adopted in the *Tier III Carriers Order*, had not in fact started, thus rendering it unlikely for Leaco to remain on its proposed schedule. Further, once a new

³⁹ See *id.* at 7.

⁴⁰ See *id.* at 5 (representing that it relied on a General Manager for "[a]ll regulatory and technical issues") (emphasis in original). In support of its request, Leaco cites to Petition for Waiver of Section 54.301 Local Switching Support Data Submission Reporting Date for an Average Schedule Company, CC Docket No. 96-45, *Order*, 19 FCC Rcd 8891, 8893 ¶ 5 (Wireline Comp. Bur. 2004), which granted a carrier's request for a waiver of a filing deadline and permission to file almost five months late based in part on the fact that the president "died less than one month before the filing deadline" The Wireline Competition Bureau found that the death had caused significant "disruption in [the carrier's] daily business operations," that the considerations in favor of waiver outweighed any processing difficulties from allowing the late filing, and that denial of the waiver would undermine the Act's universal service goals by denying the carrier an entire year of universal service funding. *Id.* at 8893 ¶¶ 5-6. Our analysis herein demonstrates that the cited order is clearly distinguishable. The Leaco Board could not have been surprised by the management disruption, had sufficient resources and ability to pursue litigation with its vendors following the departure of its former General Manager, and had ample time to bring its difficulties to our attention.

⁴¹ See *Leaco Rural Telephone Cooperative Inc. v. Lucent Technologies, et. al*, D-506-CV-200500192 (N.M. 5th Dist. Ct., Lea County), docket available at <http://164.64.40.11/caselookup/CaseDetails?case1=D&case2=506&case3=CV&case4=200500192&casestatus=CL+FINAL+CLOSED&judge=GARY+CLINGMAN&casetitle=LEACO++VS+LUCENT&filingdate=2005-03-23&statusdate=2005-05-06> (indicating that Leaco filed its complaint on March 23, 2005).

General Manager was retained in May 2005, we would have expected Leaco to have been more proactive in notifying the Commission of its current status.⁴²

14. Similarly, Leaco has not sufficiently justified, without further evidence, its request for a waiver of the applicable terms and conditions of the *Tier III Carriers Order*. Under our waiver standard, Leaco was required to document its past efforts to take the “concrete steps necessary to come as close as possible to full compliance” in support of its waiver request. Yet, for example, Leaco does not explain why it was unable to have hired a new General Manager to start at the time, or shortly after, its former General Manager departed the company in December 2004,⁴³ including the specific efforts it may have undertaken to ensure that a new general manager was in place as quickly as possible. This is all the more important if we are to accept Leaco’s argument that the Leaco Board must rely on a general manager for attending to all regulatory issues.⁴⁴ Further, Leaco does not offer specific facts behind its bare assertion that, as a small carrier, it is “dependent upon the few vendors” who can upgrade its network to CDMA, and that “[w]ithout the market power of a large, nationwide carrier, it needed to rely on a single vendor.”⁴⁵ Specifically, we are not told what actions Leaco may have attempted in order to enlist the services of other vendors at an earlier date.⁴⁶ Finally, while the Commission’s waiver standards allow for a properly documented showing of financial hardship in support of a request for relief,⁴⁷ Leaco states only that it “simply does not have the resources to proceed any faster”⁴⁸ to comply with the sale and activation benchmarks. Accordingly, we cannot grant at this time its request for additional extensions of the handset sale and activation requirements.

15. We note, however, while not addressing the merits of Leaco’s new proposed schedule for meeting the handset sale and activation benchmarks, Leaco’s revised plan includes an aggressive timeframe and a number of specific, intermediate deadlines demonstrative of its commitment to achieving compliance as quickly as possible. In addition, in a supplemental filing, Leaco indicates that, as of October 18, 2005, it was ahead of its proposed schedule.⁴⁹ Leaco also describes efforts it has undertaken to coordinate with the New Mexico E911 Director on its timetable for achieving compliance with the

⁴² Moreover, a timely request would have provided useful information to the public and relevant PSAPs regarding Leaco’s implementation status, and likely focused Leaco on resolving its underlying implementation problems at an earlier time.

⁴³ In this respect, Leaco speaks only of the “difficulty of the Board’s search for a new General Manager” as exemplified by how it was unable to have a replacement by the time its former General Manager exited in December 2004. *See* Leaco Petition at 6.

⁴⁴ *See* Leaco Petition at 5 (“the General Manager is responsible for almost every aspect of running the business. All regulatory and technical issues and problems flow through the General Manager. A small company like Leaco does not have the resources to hire redundant staff with regulatory experience” . . . the Leaco Board “is not expected to provide day-to-day telecommunications expertise”).

⁴⁵ *See id.* at 11.

⁴⁶ *See supra* ¶ 6 (a carrier basing its request for relief on delays that were beyond its control must submit specific evidence substantiating the claim, such as documentation of good faith efforts to meet with outside sources whose equipment or services were necessary to meet the Commission’s benchmarks) (citing *Order to Stay*, 18 FCC Rcd at 20996-97 ¶ 25). In fact, it was not until the filing of its Petition here, Leaco states, that it “made the decision to no longer rely on Lucent or Commnet meeting their contractual commitments, and [] is now finalizing its pursuit of alternative vendors.” Leaco Petition at 4.

⁴⁷ *See supra* ¶ 6.

⁴⁸ *See* Leaco Petition at 11-12.

⁴⁹ *See* Leaco Supplement at 2.

Phase II requirements.⁵⁰ For these reasons, including Leaco's status as a very small, Tier III carrier, and in light of the general policy underlying the ENHANCE 911 Act, we afford Leaco additional time in which it may augment the record to sufficiently justify the reasons for its delay in informing the Commission of its inability to meet the handset sale and activation deadlines it earlier proposed and for its failure to meet the deadlines required in the *Tier III Carriers Order*. Without further action on Leaco's request for waiver of the handset sale and activation requirements, the new deadline for compliance with these requirements, contained in Section 20.18(g)(1)(i)-(iv), will be six months following release of this *Order*. In addition, on or before that date, Leaco must submit further justification for its delay in notifying the Commission of its inability to meet the requirements established in the *Tier III Carriers Order*, and its failure to meet the terms and conditions of the *Tier III Carriers Order*. Finally, Leaco should continue to undertake all efforts possible to achieve compliance with the handset sale and activation requirements as quickly as possible. In affording additional time for Leaco to supplement its waiver request, we draw no conclusion about its potential liability for past noncompliance.

B. Handset Penetration Requirement

16. We believe that it is critical for all handset-based carriers to meet the final implementation deadline of December 31, 2005 for ninety-five percent location-capable handset penetration, if at all possible, in order to allow all stakeholders (including carriers, technology vendors, public safety entities, and consumers) to have greater certainty about when Phase II will be implemented and ensure that Phase II is fully implemented as quickly as possible.⁵¹ Absent Phase II location data, emergency call takers and responders must expend critical time and resources questioning wireless 911 callers to determine their location, and/or searching for those callers when the callers cannot provide this information. At the same time, however, the Commission has recognized that requests for waiver of E911 requirements may be justified, but only if appropriately limited, properly supported, and consistent with established waiver standards.⁵² Accordingly, when addressing requests for waiver of the ninety-five percent handset penetration deadline, we remain mindful that delay in achieving the required handset penetration level could impair the delivery of safety-of-life services to the public. We must also remain mindful, however, of Congress' directive in the ENHANCE 911 Act to grant Tier III waivers if strict enforcement would result in consumers having decreased access to emergency services.⁵³

17. Despite our conclusion above that we cannot at this time grant Leaco's request for an extension of its handset sale and activation deadlines, we find that the ENHANCE 911 Act requires us to grant some relief to Leaco of the requirement that it achieve, by December 31, 2005, ninety-five percent penetration among its subscribers of location-capable handsets. Consistent with the directive of the ENHANCE 911 Act, we believe that Leaco has shown under the provisions of the statute that a limited grant of the requested waiver of the December 31, 2005 benchmark is warranted, subject to certain conditions and reporting requirements to permit effective monitoring of its progress towards full compliance with the Commission's location-capable handset penetration requirement.

⁵⁰ See Leaco Petition at 8; Leaco Supplement at 2. See also *supra* ¶ 6 (citing *Order to Stay*, 18 FCC Rcd at 20997 ¶ 28).

⁵¹ See *Non-Nationwide Carriers Order*, 17 FCC Rcd at 14853 ¶ 38.

⁵² See *Tier III Carriers Order*, 20 FCC Rcd at 7709-7710 ¶ 1; *Non-Nationwide Carriers Order*, 17 FCC Rcd at 14842-14843 ¶ 6.

⁵³ See *supra* ¶ 8.

18. As a basis for granting the requested relief, Leaco states that 581 of its 5700 subscribers, approximately ten percent of its subscriber base, use three-watt analog “bag phones.”⁵⁴ Leaco adds that “[i]n many cases, these ‘bag phones’ provide superior coverage over new, digital phones on the ‘edges’ of the Leaco network due to the superior propagation characteristics of analog phones in remote areas.”⁵⁵ Leaco further asserts that customers “rely on these analog phones for both basic communication and for access to emergency services. Requiring Leaco to replace these hardy phones while Leaco upgrades its network will deny these customers access to basic emergency communications when traveling and working at the edges of Leaco’s network, thus decreasing these customers’ access to emergency services.”⁵⁶

19. In view of these factors, we find that Leaco warrants some relief under the ENHANCE 911 Act. If Leaco were required to transition analog subscribers using three-watt phones to digital CDMA handsets at the “edges” of Leaco’s service area, some subscribers might be unable to complete a phone call at all, including emergency calls. Accordingly, we find that strict enforcement of the December 31, 2005 deadline under these circumstances would impair the ability of certain 911 callers to reach emergency assistance, and thus “would result in consumers having decreased access to emergency services,” within the meaning of the ENHANCE 911 Act.⁵⁷

20. We find, however, that Leaco has failed to provide sufficient information to warrant the full extension it seeks, *i.e.*, thirteen months from the July 1, 2006 date it proposes to meet the requirement that it ensure that 100 percent of all new digital handsets activated are location-capable, because it has not adequately shown a “clear path to full compliance” with the ninety-five percent handset penetration requirement. Leaco does not specify the actual number of its customers using higher-power analog handsets that would be unable to make emergency calls, when located at the “edges” of its network, if required to upgrade to location-capable handsets. Further, Leaco has not stated whether the coverage of its CDMA overlay would be co-extensive with its current analog service, thereby obviating the need for customers to use higher-power analog phones to obtain service at the edges of Leaco’s network. Regarding the 581 of its 5700 subscribers that use analog bag phones, Leaco has made only the unsubstantiated, speculative claim that it “expects at least half of [those] customers will eventually replace their phones due to normal phone turnover and because they will be attracted by the safety features of ALI-capable phones.”⁵⁸ Leaco does not provide any information regarding its marketing and consumer education plans and programs or other efforts either to transition analog subscribers to location-capable handsets or to work with equipment vendors to accelerate the availability of higher-power location-capable handsets. Because Leaco has failed to provide specific information related to its request, including the affirmative steps it will take to achieve a ninety-five percent penetration rate, we conclude that Leaco has failed to demonstrate a “clear path to full compliance.”

21. In addition, we find that Leaco has not adequately justified the amount of time it requests to comply with the handset penetration requirement. Leaco seeks to justify the thirteen month period by comparing it with the relief that the Commission afforded other Tier III carriers in the *Tier III Carriers Order*.⁵⁹ Its reliance is misplaced, however, because the passage of time since adoption of the *Tier III*

⁵⁴ See Leaco Petition at 13.

⁵⁵ *Id.* at 13.

⁵⁶ *Id.*

⁵⁷ Pub. L. No. 108-494, § 107(a), 118 Stat. 3986, 3991.

⁵⁸ Leaco Petition at 13.

⁵⁹ See *id.* at 13-14.

Carriers Order only increases the urgency for carriers to comply with the handset penetration requirement as quickly as possible so as to best promote the interest of public safety.⁶⁰ Accordingly, the *Tier III Carriers Order* does not justify the extension of time sought by Leaco. For these reasons, we grant Leaco a more limited extension of one year following release of this *Order*.⁶¹

22. *Conditions of Grant.* As a condition of the relief granted herein of the ninety-five percent penetration requirement, we expect Leaco to actively inform and educate its customers concerning the advantages of having location-capable handsets, and to continue to keep the PSAPs located within its service area abreast of its progress in achieving ninety-five percent penetration. Specifically, we will condition the relief on Leaco, following release of this *Order*, and as an ongoing obligation until Leaco achieves a ninety-five percent handset penetration rate among its subscribers of location-capable handsets, (1) notifying its customers, such as by billing inserts, when it reasonably expects PSAPs will make valid requests for Phase II service, to the effect that by upgrading their handsets they will have the ability to automatically transmit their location information, and (2) actively working with the PSAPs to keep them informed of its progress in achieving higher location-capable handset penetration rates.

23. *Reporting Requirements.* In order to monitor compliance in accordance with the relief of the ninety-five percent penetration requirement granted herein, we will require Leaco to file status reports every February 1, May 1, August 1, and November 1, until two years following release of this *Order*,⁶² which shall include the following information: (1) the number and status of Phase II requests from PSAPs (including those requests it may consider invalid); (2) the estimated dates on which Phase II service will be available to PSAPs served by its network; (3) the status of its coordination efforts with PSAPs for alternative ninety-five percent handset penetration dates; (4) its efforts to encourage customers to upgrade to location-capable handsets; (5) the extent of subscribers located in areas with analog service only; (6) the percentage of its customers with location-capable phones; and (7) until it satisfies the ninety-five percent penetration rate, detailed information on its status in achieving compliance and whether it is on schedule to meet the revised deadline of one year following release of this *Order*. We emphasize that irrespective of the relief we grant herein, we expect Leaco to achieve compliance with the ninety-five percent handset penetration requirement as quickly as possible.

IV. CONCLUSION

24. For the foregoing reasons, we cannot grant at this time Leaco's request for further extensions of the location-capable handset sale and activation requirements applicable to it under the *Tier III Carriers Order*. We will, however, give Leaco additional time to augment the record to justify its reasons for its delay in not earlier notifying the Commission of its inability to comply with the requirements adopted in the *Tier III Carriers Order*. Without further action on the request for waiver with respect to the handset sale and activation requirements, the deadline for compliance with these

⁶⁰ In this regard, we reject Leaco's suggestion that the lack of PSAP Phase II readiness favors grant. *See id.* at 14. Location-capable handsets benefit public safety even if the customer's local PSAP is not ready for Phase II, due to the mobile nature of wireless phones. When customers travel, a location-capable phone provides them with Phase II service in the many communities where PSAPs are in fact Phase II ready.

⁶¹ We note that the Commission has not received any objections from the public safety community with respect to the instant Petition.

⁶² We note that we are requiring Leaco to file status reports beyond the one year from release of this *Order* by which we otherwise require Leaco to achieve ninety-five percent penetration among its subscribers of location-capable handsets. We believe it is important to continue monitoring Leaco's progress for an additional twelve months beyond this compliance deadline.

requirements, contained in Section 20.18(g)(i)-(iv) will be six months following release of this *Order*. In addition, pursuant to the ENHANCE 911 Act, we extend the date that Leaco must achieve ninety-five percent penetration until one year following release of this *Order*, and impose conditions and reporting requirements to ensure that Leaco achieves full compliance with the Commission's E911 requirements. We reiterate that any party seeking a waiver from our E911 rules must demonstrate a clear path to full compliance.

V. ORDERING CLAUSES

25. Accordingly, IT IS ORDERED, pursuant to the ENHANCE 911 Act, Pub. L. No. 108-494, 118 Stat. 3986 (2004), and Sections 1.3 and 1.925 of the Commission's rules, that the foregoing *Order* IS ADOPTED.

26. IT IS FURTHER ORDERED that an extension of time IS GRANTED to Leaco to augment the record with respect to its request for further extensions of time to comply with the location-capable handset sale and activation requirements contained in Section 20.18(g)(1)(i)-(iv), as requested in the Leaco Rural Telephone Cooperative, Inc. Petition for Temporary Waiver of Section 20.18(g) of the Commission's Rules. Without further action on this request, the deadline for compliance with Section 20.18(g)(1)(i)-(iv) will be six months following release of this *Order*.

27. IT IS FURTHER ORDERED that the Leaco Rural Telephone Cooperative, Inc. Petition for Temporary Waiver of Section 20.18(g) of the Commission's Rules IS GRANTED IN PART with respect to the deadline for achieving ninety-five percent penetration of location-capable handsets among its subscribers, to the extent described above, and subject to the conditions and reporting requirements specified herein. The deadline for compliance with Section 20.18(g)(1)(v) will be one year following release of this *Order*.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary